

**OPINION**  
**52-12**

May 23, 1952 (OPINION)

BIDS AND BIDDERS

RE: Certified Check Less Than Five Percent Does Not Void The Bid

In your letter of May 21, 1952, you state the following facts.

On the general contract for the Home Economics Building at the North Dakota Agricultural College the low bid was \$244,045.00. The contractor posted a certified check in the sum of \$12,000.00, or \$202.25 less than the five percent required by statute. The next lowest bid was \$254,500.00 and was accompanied by a certified check in the amount of \$13,500.00, an amount in excess of five percent of the bid.

In view of the foregoing facts you ask the following question: May the State Board of Higher Education award the general contract to the low bidder in spite of the fact that his certified check was in an amount less than required by the statute?

Section 48-0204 of the 1943 Code reads as follows:

"CONTENTS OF ADVERTISEMENT. The advertisement for bids required by section 48-0203 shall state:

1. When and where the plans, drawings, and specifications therefor may be seen and examined;
2. The place where, and the day and hour when, the bids will be opened;
3. That the right of the Board to reject any and all bids is reserved; and
4. That the right of the board to reject any and all bids is reserved; and
5. The requirement that a certified check on some solvent bank within the State of North Dakota for not less than five percent of the amount of the bid shall accompany the same as a guaranty that the bidder will enter into the contract if his bid is accepted."

The statute implies that the requirement of a certified check in the amount of five percent of the bid is for the protection of the Board and specifies that it is a guaranty that the bidder will enter into a contract if his bid is accepted.

Our courts have not ruled on this question. However, courts in other states have and we cite a few of the more important cases.

Amodeo v. Town of Woodward, 185 NW 94. This is an Iowa case where a

statute provided that the bid must be accompanied by a certified check for ten percent of the amount of the bid and the bidder had in good faith deposited a check considerably smaller. His bid was accepted but he refused to sign the contract and attempted to stop the city from cashing his check on the grounds that his bid was illegal. The court held the law was for the protection of the city only and a property owner could not complain of its illegality.

Tunney v. Hastings, 141 NW 168, a Minnesota case where the statute provided that no bid should be considered unless accompanied by a cash deposit or certified check for at least fifteen percent of the amount bid. After the bid was accepted by the city the contractor sought to withdraw on the grounds that his bid was illegal because of insufficient deposit. The court held the error was not jurisdictional. The law was intended solely for the protection of the city and did not affect the validity of the contract.

Marshall v. Dietrich, 243 Pac. 910, an Arizona case, the court said "In the absence of fraud the city council has the jurisdiction to waive an irregularity of this kind, and consider and accept the bid notwithstanding the fact that the bid bond did not comply with the strict letter of the statute." The statutes of Arizona required that a certified check in the amount of ten percent of the bid accompany the bid. The certified check in this instance was \$430.00 less than the required ten percent.

It is, therefore, our opinion that the Board may accept the low bid. That the fact that the certified check was in an amount less than provided for by a statute is not an irregularity that would make the bid void.

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